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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

BARBARA SUE RUHL,

APPELLANT,

VS.

ALABAMA STATE BAR,

APPELLEE

No. 80-5972

ORIGINAL COPY

MOTION TO DISMISS OR AFFIRM

Comes now the Appellee, the Alabama State Bar, by and through its undersigned attorney, and moves the Court to dismiss the appeal herein, or in the alternative, to affirm the order of the Supreme Court of Alabama (No. 79-570), dated September 26, 1980, and as grounds for said Motion alleges:

1) The appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to the Rules of the Supreme Court of the United States since the Appellant has failed to file and serve, not more than ninety days after the entry of the judgement appealed from, a statement as to jurisdiction as required by Rule 13 and in compliance with Rule 15, Rules of the Supreme Court of the United States.

The Appellee has been served with only one instrument, namely, "Notice of Appeal To The Supreme Court of the United States". No statement as to jurisdiction as required by Rule 13 and in compliance with Rule 15, Rules of the Supreme Court of the United States, has been served on the Appellee, and to the knowledge of the Appellee, none has been filed.

Rule 13, Rules of the Supreme Court of the United States, expressly provides, inter alia:

> "1. Not more than ninety days after the entry of the judgement appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, ...
>
> 2. Counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. ..."

Appellate jurisdiction is the threshold issue in any attempted appeal, and failure of an appellant to file the required statement as to jurisdiction should be treated as strictly jurisdictional.

Rule 16, Rules of the Supreme Court of the United States, expressly proivdes, inter alia:

> "(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules."

The Appellee respectfully submits that the Supreme Court of the United States is without jurisdiction and the attempted appeal should be dismissed.

2) The appeal should be dismissed on the ground that it does not present a substantial federal question.

Although neither the Appellant nor the Appellee has requested the clerk of the court possessed of the record to certify it or any part of it, at this posture of the case, some comment is deemed appropriate that the appeal does not present a substantial federal question.

On or about May 5, 1980, the Appellant filed with the Supreme Court of Alabama a "Petition For a Writ of Mandamus To Allow Petitioner To Be Admitted To The Practice of Law in The State of Alabama." Paragraph 24 of this petition recites:

> "24. That the denial of a mode of redress for grievances resulting from mistakes and arbitrariness discovered in the grading of petitioner's July, 1979, Bar Examination constitutes a violation of the due process clause of the Fourteenth Amendment."

The Supreme Court of Alabama directed the Alabama State Bar to file an answer and supporting brief directed only to the above-quoted paragraph of the "Petition For a Writ of Mandamus To Allow Petitioner To Be Admitted To The Practice of Law in The State of Alabama." An answer and supporting brief were duly filed resulting in the order of September 26, 1980, the subject of this appeal.

The Rules Governing Admission To The Alabama State Bar provide, in part:

> "Within sixty (60) days after the announcement of the results, a failing examinee shall be entitled to examine his/her own papers in the State Bar Headquarters for the purpose of ascertaining that the grades were transcribed correctly, and upon payment of $5.00 per section of any essay examination, the examinee will be entitled to receive a copy of the question(s), of his/her answer and the model answer, and to examine at Bar Headquarters three top papers on that particular examination."

Appellant availed herself of the above-quoted provision of the Rules Governing Admission To The Alabama State Bar as to one examiner on the subject of Business Organizations. No claim is made that there were arithmetical errors in the transcribing of grades; no claim is made that the examiner was guilty of dishonesty, fraud, misrepresentation or wilful discrimination. It was merely asserted that in the exercise of his judgement and discretion this particular examiner should have given the Appellant a higher grade. In effect, the Justices of the Supreme Court of Alabama were asked to regrade this paper and substitute their judgement and discretion for that of this examiner. There are numerous cases holding that courts, in the absence of allegations of dishonesty, fraud or wilful discrimination, will not sit as super bar examination graders and substitute their judgement and discretion for that of a bar examiner in grading essay type, timed, closed book bar examinations. See: Chaney v. State Bar of California, 386 F.2d (9th Cir. 1967), Arkansas Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971), Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), In re Monaghan, 225 A.2d 387 (Vt. 1967), Staley v. Board of California, 109 P.2d 667, 17 Cal. 2d 119 (1941), In re Myles, 180 P.2d 99 (Nev. 1947), In re Chachas' Petition, 369 P.2d 455 (Nev. 1962).

As hereinabove stated, the Appellant did not contend that the examiner did not give her sufficient credit for her answers because of fraud or intentional discrimination. The anonymity of the examinees was not questioned. At most, she asserts that in the exercise of expert judgement another expert might have reached a different result.

If this Court should determine that the Appellant has the right to demand that a court examine her bar examination answer and hold a hearing to determine the skill of the bar examiner in grading her paper, then every unsuccessful applicant has a similar right. In the future, any unsuccessful examinee would have a hope that a court would review and reject the result reached by the appointed examiners. The courts would become super bar examiners -- if, indeed, the cost and time and money of such a judicial obstacle course did not bring about the demise of all professional examinations. If this is the result as to bar examinations, the public, the courts, and the administration of justice will be the losers.

Human nature being such as it is, we are all prone to rationalize. We dare say that every failing examinee upon comparing his answer with

the model answer and the answers of the examinees given top grades would sincerely believe that his answer should have been given greater credit -- whether by one point, five points, ten points or twenty points. This would be a very tempting rationalization where one or two points are crucial to the issue of admission or non-admission. The point spread is immaterial.

The Appellant does not accuse the examiner involved of fraud or wilful misconduct in the grading of her examination. If an examinee, upon examination of his examination paper and comparing it with a model answer and answers of examinees given top grades can in good faith assert that "mistakes and arbitrariness" were shown by the examiner and due process requires regrading by a court, then virtually every examinee inspecting such answers could require regrading.

Although the Alabama Rules Governing Admission To The Alabama State Bar permit an unsuccessful examinee to examine his examination paper, a model answer prepared by the examiner and the examination of papers of examinees receiving top grades, it should be pointed out that neither the Constitution of the United States nor any statute requires such review. If so, why should right be limited to bar examinations? Would a student in law school who failed a course thereby disqualyfying him for a law school diploma, have a Constitutional right to demand review of his examination papers? The National Conference of Bar Examiners has begun giving, in many states including Alabama, multistate bar examinations. There is no review available on a multistate examination. Does this deny Constitutional rights? Many law schools require a nationally administered law school aptitute test (L.S.A.T.) for entrance to the law school. Does a student who scores below the necessary entering level have a right of review? What of the right of review for college board scores? There is no such Constitutional or statutory right.

Successful completion of each step is necessary for obtaining a law license -- successful passage of undergraduate college courses, successful graduation from law school and successful passage of the bar examination. If due process requires the courts to inject themselves into the grading at one level, logic would require them to inject themselves into the grading process at every level.

CONCLUSION

This appeal should be dismissed or affirmed because the Appellant

did not perfect her appeal by filing a timely statement as to jurisdiction.

This appeal should be dismissed or affirmed because it does not present a substantial federal question.

Respectfully submitted,

William H. Morrow, Jr.
General Counsel
Alabama State Bar

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss or Affirm was served upon Barbara Sue Ruhl, 2333 Center Way, Birmingham, Alabama, 35205, by certified United States mail, postage prepaid, this 19th day of March, 1981.

William H. Morrow, Jr.
General Counsel
Alabama State Bar